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212-424—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 964

NED EDWARD HETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 353 F. 2d 761.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1965. A timely petition for rehearing was denied on January 3, 1966. The petition for a writ of certiorari was filed on January 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error by refusing to strike the direct testimony of

two witnesses who invoked the privilege against self-incrimination on cross-examination.

2. Whether, in order to constitute an offense under 18 U.S.C. 1073, a trip in commerce with intent to avoid prosecution for a State offense must have commenced in the State where the offense was committed.

STATUTE INVOLVED

18 U.S.C. 1073 provides in pertinent part:

> Whoever moves or travels in interstate or foreign commerce with intent * * * to avoid prosecution * * * under the laws of the place from which he flees, for a crime * * * which is a felony under the laws of the place from which the fugitive flees, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

On February 7, 1964, petitioner was convicted by a jury in the United States District Court for the Western District of Washington on four counts of a five-count indictment charging him with violations of 18 U.S.C. 2, 3, 4 and 1073 (R. I, 21). Petitioner was sentenced to imprisonment for a period of five years on count III, and with lesser concurrent prison terms on the other counts (R. I, 25).[1] The court of appeals affirmed the conviction under count III without consideration of the other counts (R. I, 35–39; Pet. App. B). Count III charged petitioner under 18 U.S.C. 1073 with aiding, counselling and abetting one Richard Young in travelling in foreign commerce with the intent to avoid prosecution in the State of Washing-

[1] Petitioner was sentenced to three years on count II, to two and one-half years on count IV, and to three years on count V.

ton for the December 1, 1962, robbery of a grocery store in Kirkland, Washington.

1. The evidence at trial showed that petitioner was the attorney for Richard Young and his wife, representing them in domestic affairs litigation and other matters (R. III, 81–82, 106–111; R. V, 608, 663–675). On December 1, 1962, a grocery store in Kirkland, Washington, was robbed of approximately $2,600 (R. III, 34, 49; R. VI, 751–752). Nine days later, a complaint charging Young with the Kirkland robbery was filed with the county prosecutor (R. III, 25–29, 50, 56). Petitioner was informed of the charge and shown a copy of the warrant for Young's arrest on January 4, 1963 (R. III, 29–31). On January 7, 1963, an additional complaint was filed in the federal district court charging that Young had fled the state of Washington with the intent to avoid prosecution for the Kirkland robbery (R. III, 44, 51–53). Petitioner became aware of this outstanding warrant by at least January 30, 1963 (R. III, 45–46, 164–165; R. V, 612).

In the meantime, on January 24, 1963, Young and another man robbed a bank in Portland, Oregon, of about $55,000 (R. III, 69–70, 125; R. IV, 398–400; R. V, 683–687, 690; R. VI, 746–747). Young thereafter fled south to Salt Lake City, Los Angeles and San Francisco (R. III, 73; R. V, 687–691). During the period preceding and following the Oregon robbery, Young was in weekly communication with petitioner (R. V, 611), and met with him on about January 20 (R. V, 612).

Some time in February, 1963, Young decided that the threat of prosecution made it desirable for him to

attempt to leave the country (R. VI, 743–745). He discussed with petitioner the various crimes he was accused of and the possibility of departing the country (R. V, 638). Petitioner wrote letters to appropriate agencies requesting birth certificates and information regarding the requirements for a permanent visa to Brazil (R. IV, 397–398).

On the weekend of March 1–3, 1963, petitioner flew to San Francisco with Mrs. Young to discuss with Young means for facilitating Young's departure from the United States (R. III, 89–90, 104–106; R. IV, 367–368; R. V, 523–527, 613–616, 700). At this meeting Young told petitioner that he and one Tichenor were coming to Seattle in the near future and would require transportation out of the Seattle area (R. V, 615, 644). On March 4, 1963, Young and Tichenor arrived in Seattle (R. IV, 368; R. V, 528–529, 550, 644–645, 701). Petitioner met with Young and Tichenor at least three times in the next five days (R. V, 645–650). At one of the meetings, petitioner suggested that Young disguise himself while in the Seattle area; and, for this purpose, petitioner ordered frame glasses from his optometrist (R. V, 497–504, 518, 522, 529–532, 646–647). Arrangements were also made for Young and Tichenor to fly back to California in petitioner's airplane (R. V, 648, 651).

On March 8, 1963, Young and Tichenor robbed the Northgate Bon Marche store in Seattle of about $40,000 (R. VI, 719–723). On that day, petitioner was informed that the two men were ready to leave Seattle (R. V, 652). A pilot, who was paid $300 by petitioner for the flight, flew Young and

his companion to California in petitioner's plane (R. V, 535, 651–655; R. VI, 724, 872–877). Young paid petitioner $1,000 for the flight (R. V, 653, 656).

Following his meeting with Young in San Francisco, petitioner set about to create a new identity for Young as "John T. Anderson" in order to facilitate obtaining a passport and Brazilian visa (R. III, 169–172, 186, 204–206, 223–225; R. IV, 226–247, 297–304). By the third week in March, petitioner had secured all the documents necessary for Young's departure from this country (R. IV, 226–247, 297–304; R. V, 616–618) and mailed these to petitioner's mother-in-law in California, where Young picked them up (R. IV, 211–213; R. V, 618–628). Between March 9 and March 28, 1963, petitioner and Young were in almost daily communication (R. V, 616, 637–638). Young sent petitioner between $10,000 and $14,000 during February and March (R. V, 657) and also rented a safety deposit box jointly with petitioner in California in which he deposited about $17,000 in travelers' checks made out to petitioner (R. V, 657–663; R. VI, 802–806).

On March 28, 1963, after informing petitioner that he was leaving the United States, Young departed for Brazil using the documents supplied by petitioner, supplemented by additional documents obtained by Young in California (R. V, 633). Young wrote several letters and telegrams to petitioner from Brazil using the name of Bowen (R. IV, 371–378; R. V, 638–644). Petitioner in turn corresponded with Young in care of "Bowen" stating that everything was all right and that the authorities were

frustrated (R. III, 172–173; R. IV, 371–378; R. V, 473–478, 639–644; R. VI, 921–922).[2]

Petitioner was arrested, with Mrs. Young, while they were in California trying to arrange documents and clearance for Mrs. Young to join her husband in Brazil (R. III, 82–103; R. IV, 369, 387–417, 428–439). Young was returned to the United States from Brazil and arrested on April 5, 1963. Still in his possession were documents supplied by petitioner (R. III, 169–172; R. V, 644, 737). Young stated that one of the reasons for the flight to Brazil had been to avoid arrest and prosecution for the Kirkland grocery store robbery of December 1, 1962 (R. V, 638; R. VI, 745, 755–756, 766–776).

2. The evidence summarized above appeared principally through the testimony of Tichenor and Young. One of the questions raised in the petition relates to the cross-examination of these witnesses.

a. Tichenor testified on direct examination that he had first met Young in Oakland, California, during February, 1963 (R. V, 523), and that he first saw petitioner in California during the first weekend in March (R. V, 523–527). Tichenor testified that he went to Seattle with Young on March 4, 1963 (R. V, 528), was present at various meetings with petitioner

[2] On March 29, 1963, F.B.I. agents left circulars at petitioner's office stating that Young was wanted by the federal authorities for fleeing the State of Washington to avoid prosecution, was armed and extremely dangerous and requesting anyone possessing information as to Young's whereabouts to communicate with the local F.B.I. office (R. III, 47–48, 165–167; R. IV, 393).

(R. V, 529–533), and left Seattle for California in petitioner's airplane on March 8, 1963 (R. V, 535).

On cross-examination, Tichenor at first refused to state his purpose in coming to Seattle on March 4 (R. V, 550–551, 577).[3] Tichenor was directed to answer and admitted that he came to Seattle on March 4, 1963, "in connection with the proposed robbery of the Northgate Branch of Bon Marche" (R. V, 577). He further testified that he and Young were together at the Bon Marche from 9:00 to 9:30 p.m. on March 8 (R. V, 583, 590, 595–596). Tichenor was permitted to refuse to answer what Young did during that time interval (R. V, 583–584), whether he or Young had anything on their faces while at the Bon Marche (R. V, 591), where he was in the Bon Marche (R. V, 591–592), what he and Young did in the Bon Marche (R. V, 591) and whether he and Young had robbed the Bon Marche on that occasion (R. V, 592). It was then shown that Tichenor had entered a plea of guilty to the charge of transporting $40,000 in stolen money from Seattle to California on March 8, 1963 (R. V, 599–600).

b. After giving the testimony summarized at pp. 3–6, *supra,* on direct examination, Young testified on cross-examination as to his movements between the

[3] In a bench conference, counsel said he expected to show that Tichenor and Young arrived in Seattle on March 4; that they stayed in Seattle until the evening of March 8; and that their major purpose while in Seattle was to plot and execute the robbery of Bon Marche, which they did about 9:00 p.m. on March 8, 1963 (R. V, 558).

Kirkland robbery on December 1, 1962, and his trip to California following the Portland bank robbery on January 24, 1963 (R. V, 677–694). Young also testified that he and Tichenor took a trip to Vancouver, Washington, and Portland, Oregon, in the middle of February, 1963 (R. V, 695–699), but refused to give the reason for the trip on the ground of possible self-incrimination (R. V, 696). Defense counsel did not press the point (R. V, 697). Young then testified about the March 1–3 conference with petitioner in California (R. V, 700–702) and his arrival with Tichenor in Seattle on March 4, 1963. He refused, however, to give his "reason or intent or purpose" for coming to Seattle at that time (R. V, 702–704). He continued to testify about his activities in Seattle, including the fact of his presence at the Bon Marche, but he refused to say why he was at the Bon Marche (R. V, 705). He also refused to say where he was about 7:00 p.m. on March 8, 1963 (R. V, 706), to state the place from which he had come to the airport that night (R. V, 707) or why he wanted to move from Seattle to California on March 8 (R. V, 707). At this point, defense counsel showed that Young had entered a plea of guilty to an indictment charging Young and Tichenor with transporting $40,000 in stolen money from Seattle to Oakland, California, on March 8 (R. V, 708–709). Young refused, however, to give the source of the $40,000 (R. V, 709–712). After a recess, government counsel stipulated that Young and Tichenor had robbed the Bon Marche on March 8 (R. VI, 719–723). Defense counsel asked no

more questions about the Bon Marche robbery on cross-examination (R. VI, 724–750).[4]

ARGUMENT

1. The trial judge acted well within his discretionary powers to regulate the scope of cross-examination when he permitted Young and Tichenor to invoke their privilege when asked questions calling for a direct admission of the Bon Marche robbery and when he refused to strike the direct testimony of these two witnesses on that account. As pointed out by the court of appeals (Pet. App. 9a), it is difficult to perceive how a further inquiry into the Bon Marche robbery would have helped petitioner. It was obvious that Young and Tichenor came to Seattle on March 4 primarily to plan and execute the Bon Marche robbery; and the government stipulated that they did, in fact, commit that robbery on March 8, 1963. It was equally obvious that the two robbers fled to California in petitioner's airplane on March 8 primarily to escape apprehension for the Bon Marche robbery. Moreover, defense counsel expressed his willingness to stand on the government's stipulation and asked no further questions after the stipulation was made.

Thus, while the fact that the Bon Marche robbery had occurred was concededly relevant in establishing Young's motive in fleeing to Brazil on March 28, peti-

[4] The trial court suggested that counsel could still inquire generally whether one of the purposes for the March 8, 1963, flight was to avoid arrest for a crime committed during that period (R. VI, 721–722). Counsel responded that "I am satisfied to have this stipulation made and let the record stand as it now stands" (R. VI, 721).

tioner was not remotely hindered in establishing that fact by the witnesses' claim of privilege. The instant case, therefore, does not in any sense present that "clear abuse of discretion" resulting in "obvious prejudice" which would warrant interference by a reviewing court with regard to limitations on cross-examination. See *Coil* v. *United States,* 343 F. 2d 573, 578 (C.A. 8); *United States* v. *Smith,* 342 F. 2d 525 (C.A. 4), certiorari denied, 381 U.S. 913. The cases cited by petitioner (Pet. 13) are not remotely comparable on their facts and present no conflict with the instant case.[5]

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[5] Petitioner also appears to urge (Pet. 12) that he was impeded in his recross-examination of Young with regard to a statement previously signed by Young relating to Young's motives for the flight to Brazil. On recross-examination, Young testified that the Kirkland robbery was a purpose but not the primary purpose for his movement from Washington to Portland, Oregon, in January and for his flight to Brazil in March (R. VI, 768). At this point, defense counsel sought to impeach Young with the signed statement which had been made before trial. This statement, which was read to the witness in front of the jury, contained admissions of complicity in the Portland and Bon Marche robberies. The statement pointed to these two robberies as the motivations for Young's interstate and foreign movements, and disclaimed the Kirkland robbery as a factor motivating these flights (R. VI, 771–776). When examined on the statement, Young at various points admitted signing it and admitted that he made the admissions therein concerning the Kirkland and Portland crimes (R. VI, 771–775, 780). At other points, however, he refused to admit, on grounds of self-incrimination, that the whole statement was his or that he made the admission that he had committed the Bon Marche robbery, and he asserted that the statement was inaccurate with regard to whether the Kirkland robbery had motivated his flight. (R. VI, 772–775). Young's refusal to answer some of the questions relating to the statement thus did not constitute a hindrance to petitioner's examination of Young's motives for the flight to Brazil.

2. Section 1073 of Title 18 makes it a criminal offense for a person to move in interstate or foreign commerce with the intent to avoid a felony prosecution under the laws of the State from which he flees. Petitioner argues that he was charged in count III only with aiding and abetting Young's flight from *California* to Brazil, whereas Young was avoiding a prosecution under the law of *Washington*. Thus, petitioner argues that he did not aid Young in fleeing from the State of potential prosecution, as the statute requires (Pet. 19–23).

The court of appeals, however, properly concluded that Young's travel from California to Brazil constituted flight from Washington within the meaning of the statute, even though Young tarried in California after he left Washington. Flight from a given place remains such, even though it takes place in several stages or is interrupted. Thus, Young's physical movement from California to Brazil was part of his flight from Washington, designed to avoid Washington's ability to apprehend and gain custody. Any other construction of Section 1073 would artifically deprive the statute of its intended application in broadly aiding the apprehension of fugitives from State justice.[6]

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[6] The legislative history characterized the provision as "making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution." H. Rep. No. 1458, 73d Cong., 2d Sess., p. 1. The purpose was to give federal aid to States in solution of offenses involving "roving criminals." Congress concluded that "[t]he ability of Federal officers to follow a criminal from one State to any other State or States, as provided in the above bill, should furnish the desired relief from this class of law evaders." *Id.* at 1–2.

Congress enacted a similar provision in the Civil Rights Act of 1960 by making it a crime to move in interstate commerce

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

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with the intent to avoid prosecution under the laws of the place from which a person flees for willfully damaging any building, structure, facility, vehicle, dwelling house, synagogue, church, religious center or educational institution. 18 U.S.C. 1074. As with the earlier statute, Congress was mainly interested in alleviating the peculiar difficulties interjected into law enforcement by interstate or foreign travel. H. Rep. No. 956, 86th Cong., 1st Sess., pp. 5–6.

U.S. GOVERNMENT PRINTING OFFICE: 1966